

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff,

-against-

NEW YORK CITY BOARD OF HEALTH, NEW YORK
CITY DEPARTMENT OF HEALTH AND MENTAL
HYGIENE, and Thomas R. Frieden, In His Official Capacity
as Commissioner of the New York City Department of Health
and Mental Hygiene,

Defendants.

No. 2008 Civ. 1000 (RJH)

DECLARATION OF KENT A. YALOWITZ

Kent A. Yalowitz declares as follows:

1. I am a member of the bar of this Court and of the firm of Arnold & Porter LLP, counsel for the Plaintiff New York State Restaurant Association ("NYSRA") in the above-captioned case.

2. This declaration is based on documents which we received within the last few days from the Defendants in response to a FOIL request. These documents are submitted with this declaration in order to correct possible misimpressions regarding the status of a study conducted by the New York City Department of Health and Mental Hygiene ("DOHMH") upon which defendants rely to support their contention that New York City Health Code section 81.50 ("Regulation 81.50") will reduce the prevalence of obesity among New York City residents.

3. The study, a survey of calorie information and calorie ordering at New York City chain restaurants conducted in 2007, was heavily relied on by the DOHMH as empirical evidence that Regulation 81.50 will have its intended effect. Notice of Adoption of Regulation 81.50, Jan. 22, 2008, at 4, 6-7. Critiques of the study and of its interpretation by DOHMH were

presented in the Jan. 29, 2008 Declaration of David B. Allison, Ph.D., submitted by plaintiff in support of its motion for declaratory and injunctive relief. In response, defendants submitted Declarations by DOHMH Commissioner Frieden and Deputy Commissioner Mary T. Bassett, co-authors of the study, Frieden Declaration 2/8/08 ¶¶ 32, 43; Bassett Declaration 2/8/08 ¶¶ 3-11. Deputy Commissioner Bassett reported that the DOHMH study was “currently under review by a peer-reviewed journal.” She failed to disclose, however, that the study has been rejected by two journals, the reasons given for rejection, and her subsequent personal involvement in recruiting peer reviewers to review a study of which she was the lead author. This information has recently come to light as a result of DOHMH’s belated response to a Freedom of Information Law request for its records on the study. Those records establish the facts set forth below. Copies of the relevant records are attached.¹

4. The DOHMH first attempted to have the study published in Morbidity and Mortality Weekly Reports (“MMWR”), a weekly publication of the United States Centers for Disease Control. In November 2007, Commissioner Frieden wrote to MMWR Editor Dr. Frederic Shaw asking to have the study published. Dr. Shaw requested an abstract of the study, which Commissioner Frieden provided. On December 29, 2007, Dr. Shaw wrote back, rejecting the article with the following comments:

“I read the article carefully and asked a few others to also take a look, and I do not feel it bears publishing in MMWR as it stands. The conclusions being drawn by the study are, of course,

¹ On November 15, 2007, we made a Freedom of Information Law (“FOIL”) request for all records within the custody or control of the DOHMH that relate to the survey. The DOHMH “granted” it in full and produced certain records. See Milburn letters of 10/24/07 and 12/28/07 and DOHMH letters of 12/6/07 and 1/8/08, attached as Exhibit A. However, the DOHMH did not disclose its submission of the study to a peer-reviewed journal. After reading Dr. Bassett’s Declaration, we made a second FOIL request, and DOHMH finally produced records relating to peer review under cover of a letter dated March 28, 2008. See Milburn letter of 2/20/08 and DOHMH letters of 3/4/08, 3/17/08 and 3/28/08, also attached as Exhibit A.

problematic because of the lurking probability that people who look at caloric information are much different from everybody else, a priori. The fact that the chain under study was Subway is also a problem for interpretation because that chain is associated with lower-calorie meals and is marketed that way.

In my mind, it is not possible to conclude that looking at the caloric info is causally related to calorie purchase . . . yes, there is an association, no doubt, but the association might just be reflecting the psychology of people who both look at caloric information and eat fewer calories. To establish causality, there would have to be other probably longitudinal study methods, like looking at consumption before and after caloric info were posted.”

See Exhibit B, e-mail of 12/29/97. These comments of Dr. Shaw parallel points made by Dr. Allison in his two Declarations submitted in support of plaintiff’s motion. Allison Declaration 1/29/08 at 22-28; Supplemental Allison Declaration 2/14/08 at 4-5.

5. In January 2008, the DOHMH submitted the report for publication in the *Journal of the American Medical Association* (“JAMA”) as a “Brief Report.” JAMA rejected the article without sending it out for peer review. See Exhibit C.

6. After the rejection by JAMA, Deputy Commissioner Bassett wrote to Dr. Mary Northridge. Drs. Bassett and Northridge are on the faculty together at the Columbia School of Public Health. Both are also on the Editorial Board of the *American Journal of Public Health* (“AJPH”). Dr. Northridge is the Editor-in-Chief of the AJPH, and Deputy Commissioner Bassett is an Associate Editor. Deputy Commissioner Bassett attached a summary of the DOHMH study and explained to Dr. Northridge that the study’s content related to the DOHMH’s effort to enact a regulation requiring posting of calorie information. Alluding to the decision enjoining the earlier version of Regulation 81.50, Deputy Commissioner Bassett wrote that “we [DOHMH] really want it [the study] published or at least accepted, in time for what we expect is coming—another suit.” Dr. Northridge replied that she would “shepherd it through the peer review process once it is formally submitted” and requested Deputy Commissioner Bassett to list six

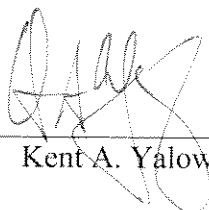
“suitable” peer reviewers. See Exhibit D.

7. Deputy Commissioner Bassett then wrote to Dr. Kelly Brownell, a Yale University obesity researcher who appeared in this action as *amicus curiae* in support of defendants in this action and NYSRA I. Deputy Commissioner Bassett asked Dr. Brownell if he would be willing to serve as a peer reviewer to review the DOHMH study for *AJPH*: “And as we are anxious for legal reasons (we expect another suit) to get it into print, would you be willing to turn a review around quickly?” Dr. Brownell agreed. Deputy Commissioner Bassett wrote to thank him and to advise him that he would be contacted by the *AJPH* to ask him to serve as a reviewer. See Exhibit E.

8. Deputy Commissioner Bassett made a similar request to another obesity researcher, Dr. Marion Nestle. Like Dr. Brownell, Dr. Nestle appeared in this action and in NYSRA I as an *amicus curiae*. Deputy Commissioner Barrett again alluded to the expected litigation and the consequent need to “turn [the review] around quickly.” Again Deputy Commissioner Bassett first verified that Dr. Nestle “would be OK with it [serving as reviewer]” and then told Dr. Nestle that she would be contacted by *AJPH*. Deputy Commissioner Bassett also asked both Drs. Brownell and Nestle to suggest other reviewers. Dr. Nestle suggested “someone at CPSI?” CPSI, the Center for Science in the Public Interest, is yet another *amicus curiae* appearing on defendants’ behalf that describes itself as an advocacy organization that has “led the advocacy efforts on behalf of New York City’s restaurant calorie labeling rule.” See Exhibit F.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 2008



Kent A. Yalowitz

ARNOLD & PORTER LLP

Nancy G. Milburn
Nancy_Milburn@aporter.com
212.715.1008
212.715.1399 Fax
399 Park Avenue
New York, NY 10022-4690

November 15, 2007

The City of New York
Department of Health and Mental Hygiene
General Counsel's Office
Attn: Rena Bryant
125 Worth Street
Room 602
New York, NY 10013

Re: Freedom of Information Law Request

Dear Records Access Officer:

This is a request pursuant to the New York State Freedom of Information Law, Public Officers Law Article 6, §§ 84-90 ("FOIL").

On October 24, 2007, the New York City Board of Health released a "Notice of Intention to Repeal and Reenact §81.50 of the New York City Health Code" (the "Notice"), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf>. In the Notice, the Board of Health describes the following survey conducted by the New York City Department of Health and Mental Hygiene (the "Department"):

To obtain more information about patterns of food consumption in New York City restaurant chains affected by the December 2006 Health Code Amendment, the Department conducted a large survey in a representative sample of major restaurants chains in New York City. The survey, conducted in March through June of this year, collected information from 11,835 diners at a random sample of 275 restaurants, representing 13 restaurant chains. As patrons left the restaurant, they were asked to supply their restaurant receipt and to answer several brief questions, including details of the purchase not reported on the receipt, whether the purchase was only for themselves,

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whether they saw or used any available calorie information, and if so, whether this affected their purchase.

Notice, at 5.

I request all "records" within the custody, possession, or control of the Department, as the term "records" is defined in Public Officers Law § 86, that relate, in whole or in part, to the survey referenced above in the Notice. By way of example only, my request includes, but is not limited to, all records relating to the survey's design and development, any instruction(s) given to canvassers, all raw data collected during the survey (i.e., all questionnaires with information collected from the surveyed diners), and all qualitative or quantitative analyses performed on the raw data.

In accordance with the 2005 amendments to FOIL (Chapter 22, Laws of 2005), I look forward to receiving these records within twenty business days. You are authorized in advance to incur up to \$1,000 in copying costs. If the amount will exceed that, please inform me. Please also call me if you have any questions about this request.

Sincerely,

Nancy G. Milburn

Nancy G. Milburn



THE CITY OF NEW YORK

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

nyc.gov/health

December 6, 2007

Arnold & Porter LLP
399 Park Avenue
New York, N.Y. 10022-4690
ATTENTION: Nancy G. Milburn, Esq.

Re: DOHMH Survey March-June, 2007
Control #: 2007FR02952

Dear Ms. Milburn:

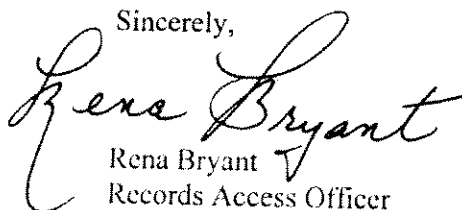
Your Freedom of Information Law request for all "records" maintained by the Department of Health and Mental Hygiene regarding the above referenced survey is hereby granted in part and denied in part.

It is granted to the extent that you may have copies of the questionnaires with information collected from the surveyed diners, consisting of 23,680 pages (a questionnaire and the diner's receipt; and 275 observation logs (one per site). Also available are 184 pages of printed tables. These 24,137 paper records are available for a copying fee of \$0.25/page. Also available are various data bases copied electronically onto a CD at \$15.00 for the disc. If you wish these records, please forward a check payable to the New York City Department of Health and Mental Hygiene in the amount of \$6,049.25.

Your request for copies of records relating to the survey's design and development and instructions given to canvassers is denied, pursuant to Section 87(2)(g) of the New York Public Officers Law since these records are inter-agency materials that are not instructions to staff that affect the public and/or final agency policy or determinations.

You may file a written appeal of the part of this decision denying your request within 30 days of the date of this letter. The appeal should be addressed to the Appeals Officer, Thomas Merrill, General Counsel, Department of Health and Mental Hygiene, 125 Worth Street (CN-30), New York, NY 10013. The Notice of Appeal should include the above control number, the date of this denial letter, a description of the records which were the subject for the request, and the full name and address of the requester.

Sincerely,


Rena Bryant
Records Access Officer

ARNOLD & PORTER LLP

Nancy G. Milburn
Nancy_Milburn@aporter.com

212.715.1008
212.715.1399 Fax

399 Park Avenue
New York, NY 10022-4690

December 28, 2007

The City of New York
Department of Health and Mental Hygiene
General Counsel's Office
Attn: Thomas Merrill
125 Worth Street (CN-30)
New York, NY 10013

Re: Appeal from Denial of Freedom of Information Law Request,
Control No. 2007FR02952

Dear Mr. Merrill:

I write in response to Rena Bryant's letter, dated December 6, 2007, denying my request for records relating to the design and development of the diner survey and instructions given to canvassers.

The Board's decision to withhold these records from the public is without basis. The Board published the results of its diner survey in the Notice of Intention to Repeal and Reenact § 81.50 of the New York City Health Code, and it relies on the results of the survey as a basis for proposing the new Regulation. Having published the results of the survey and a description of how it was conducted, the Board should not be entitled to keep the survey design from the public. In the Notice of Intention, the Board is asking the public to accept the survey's findings, and the Board's interpretation of those findings. Under those circumstances, surely the public should be allowed to see how the City constructed the survey.

Moreover, the applicable case law and advisory opinions issued by the New York Committee on Open Government fully support disclosure of the withheld design materials. Records that represent a final agency determination or policy may not be withheld as "inter-agency or intra-agency material." N.Y. Pub. Officers Law Art. 6 §87(2)(g)(iii). Therefore, all records relating to the final proposed survey design—which was eventually adopted and implemented—should be disclosed pursuant to §87(2)(g)(iii). Even non-final agency records must be disclosed insofar as those records include statistical or factual data, pursuant to §87(2)(g)(i). "Factual data" means "objective information, in contrast to opinions, ideas or advice exchanged as part of the consultative or deliberative process of government decision making." Matter of Gould v. New York City Police Dept., 89 N.Y.2d 267, 276-77 (1996). The exemption in §87(2)(g)(i) permits

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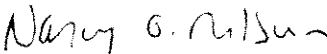
Records relating to canvassing instructions must be disclosed pursuant to §87(2)(g)(ii) because they are "instructions to staff that affect the public." In Advisory Opinion No. 12243 issued by the New York Committee on Open Government on July 31, 2000, Executive Director Robert Freedman clarified the "instruction to staff" exception:

§87(2)(g) is intended to [e]nsure that any so-called 'secret law' of an agency be made available, such as the policy 'upon which an agency relies' in carrying out its duties. Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they perform their duties. Some may be 'internal,' in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be public. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination each would represent a matter that is mandatory or which represents a final step in the decision making process. (Emphasis added.)

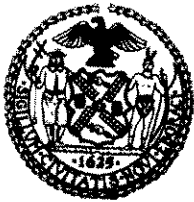
As Mr. Freedman's opinion makes clear, directions to an agency's employees regarding the means by which they perform their duties must be disclosed under the exceptions in §87(2)(g), and an instruction to staff represents a mandatory direction. Our request for instructions to canvassers falls squarely within §87(2)(g)(ii) since such instructions directly affect how the canvassers related to and interacted with the public (e.g., what questions canvassers are to ask, which customers are to be polled, and which restaurants are selected for review).

FOIL is based upon a presumption of access. See N.Y. Pub. Officers Law Art. 6 §84. Courts have routinely held that the "exemptions [to disclosure] are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption." Matter of Hanig v. State of N.Y. Dept. of Motor Vehs., 79 N.Y.2d 106, 109 (1992). The Department's expansive reading of §87(2)(g) is inconsistent with the principles underlying the New York State Freedom of Information Law. Therefore we request that all withheld records concerning the design and development of the survey, and instructions to canvassers be made available.

Sincerely,


Nancy G. Milburn

cc: Mark W. Muschenheim, Esq.



THE CITY OF NEW YORK

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

nyc.gov/health

January 8, 2008

Arnold & Porter LLP
399 Park Avenue
New York, N.Y. 10022-4690
ATTENTION: Nancy G. Milburn, Esq.

Re: DOHMH Survey March-June, 2007
Control #: 2007FR02952

Dear Ms. Milburn:

I am in receipt of your letter dated December 28, 2007, appealing the partial denial of your Freedom of Information Law request for all "records" maintained by the Department of Health and Mental Hygiene regarding the above referenced survey.

Please be advised that your appeal is herewith granted. Records related to the survey's design and development and the instructions given to canvassers will be added to the materials put on a CD, as described in Ms. Bryant's December 6, 2007 letter. We are also in receipt of your December 21, 2007 request for certain paper documents, and indicating that you do not want copies of the individual questionnaires and receipts. Please forward a check to the attention of Rena Bryant at the address below, payable to the New York City Department of Health and Mental Hygiene in the amount of \$129.75, covering the costs of copying both 184 pages of printed tables and 275 pages of observation logs (459 pages at \$0.25/page=\$114.75) and the CD containing the data bases and survey materials (at \$15.00 for the disc).

Yours truly,

A handwritten signature in black ink, appearing to read "T. Merrill".

Thomas Merrill
General Counsel
Appeals Officer

ARNOLD & PORTER LLP

Nancy G. Milburn
Nancy_Milburn@aporter.com
212.715.1008
212.715.1399 Fax
399 Park Avenue
New York, NY 10022-4690

February 20, 2008

The City of New York
Department of Health and Mental Hygiene
General Counsel's Office
Attn: Thomas Merrill
Rena Bryant
125 Worth Street - Room 602
New York, NY 10013

Re: **FOIL Request, Control No. 2007FR02952**

Dear Mr. Merrill and Ms. Bryant:

On November 15, 2007 I made a request under the Freedom Of Information Law ("FOIL") for records relating to a survey of restaurants conducted by the NYC Department of Health and Mental Hygiene (the "Department") in 2007 (the "survey"). A copy of that request is enclosed. On December 6, 2007 you granted the request in part. Following an appeal on January 8, 2008, you granted the request in full, and provided us with responsive documents. Copies of the partial and full grant letters are enclosed.

On February 8, 2008, Commissioner Thomas Frieden and Deputy Commissioner Mary Bassett signed Declarations in the case, *New York State Restaurant Association v. New York City Board of Health*, 08-Civ-1000 (RJH), that refer to information and records related to the survey that have not been provided to me. Copies of those Declarations are enclosed. This is to request that the Department provide to me the following documents:

- (a) All records indicating that, at the time of the study, Subway restaurants posted nutritional information "on a sticker placed on a display case near the cash register." See Frieden Declaration ¶ 32;
- (b) All records indicating that, at the time of the survey, Subway restaurants posted calorie information on glass case decals. See Bassett Declaration ¶ 8.

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(c) All records consisting of, relating to or referring to, manuscripts or articles summarizing the methods and results of the survey prepared for publication, including without limitation any correspondence with journals or journal editors regarding possible publication. See Bassett Declaration ¶¶ 4-5.

(d) All other records specified in my November 15, 2007 FOIL request that have not yet been produced to us (aside from the questionnaires and receipts we advised you we did not want).

In accordance with the 2005 amendments to FOIL (Chapter 22, Laws of 2005), the requested documents should have already been provided to me. Please provide them to me as soon as possible. You are authorized in advance to incur up to \$500 in copying costs. If the amount will exceed that, please inform me. Please also call me if you have any questions about this request.

Sincerely,

Nancy G. Milburn

Nancy G. Milburn

Enclosures

cc: Mark Muschenheim, Esq.



THE CITY OF NEW YORK

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

nyc.gov/health

March 4, 2008

Arnold & Porter LLP
399 Park Avenue
New York, N.Y. 10022-4690
ATTENTION: Nancy G. Milburn, Esq.

Re: Control #: 2008FR00493

Dear Ms. Milburn:

I am in receipt of your letter dated February 20, 2008, requesting additional records pursuant to the Freedom of Information Law maintained by the Department of Health and Mental Hygiene (the "Department"), regarding findings at Subway restaurants and "all records consisting of ... methods and results of the survey prepared for publication, including without limitation any correspondence with journals or journal editors regarding possible publication." In your letter you cite to the declarations of Dr. Frieden and Dr. Bassett in connection with the litigation you commenced in federal court. You also request "all other records specified in [your] ... November 15, 2007 FOIL request that have not yet been produced to us (aside from the questionnaires and receipts we advised you we did not want)" under FOIL Control #2007FR02952.

Please be advised that the Department considers your initial FOIL request, Control #2007FR02952, as having been fully complied with. With respect to the specific records you request in your February 20, 2008 letter, please be further advised that the Department has undertaken a search to determine if there are any records responsive to your request, and we will notify you of any available records after such a search is completed.

Yours truly,


Rena Bryant
Records Access Officer



THE CITY OF NEW YORK

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

nyc.gov/health

March 17, 2008

Arnold & Porter LLP
399 Park Avenue
New York, N.Y. 10022-4690
ATTENTION: Nancy G. Milburn, Esq.

Re: Control No.: 2008FR00493

Dear Ms. Milburn:

Please be advised, in response to your letter dated February 20, 2008, pursuant to the Freedom of Information Law (NY Public Officers Law §§84-90), requesting additional records maintained by the New York City Department of Health and Mental Hygiene (Department), regarding findings at Subway restaurants and "all records consisting of ... methods and results of the survey prepared for publication, including without limitation any correspondence with journals or journal editors regarding possible publication" and "all other records specified in [your] ... November 15, 2007 FOIL request that have not yet been produced to us (aside from the questionnaires and receipts we advised you we did not want)" under FOIL Control No. 2007FR02952, that there are no additional records.

With respect to records related to the declarations of Dr. Frieden and Dr. Bassett in connection with the litigation you commenced in federal court, the Department has identified 56 pages of records responsive to your request. These records have been redacted of intra-agency information that are not final agency determinations. See, NY Public Officers Law § 87(2)(g). If you wish copies of these records, please forward a check payable to the New York City Department of Health and Mental Hygiene in the amount of \$ 14.00 to my attention.

Yours truly,


Rena Bryant
Secretary and Records Access Officer

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Office of the Secretary - 125 Worth Street, CN-31, New York, NY 10013
Telephone #: (212) 788-4308; Fax #: (212) 788-4315



THE CITY OF NEW YORK
DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

nyc.gov/health

March 28, 2008

Arnold & Porter LLP
399 Park Avenue
New York, N.Y. 10022-4690
ATTENTION: Nancy G. Milburn, Esq.

Re: Control No.: 2008FR00493

Dear Ms. Milburn:

As per the Department's March 17, 2008 letter to you, attached please find 46 pages of responsive and releasable records regarding the above-referenced FOIL request. Please note that, due to a typographical error in the Department's March 17, 2008 letter to you, the actual number of pages being released is 46, not 56. Please advise whether you wish to seek a refund from the Department for this difference (\$ 2.50).

Sincerely,

Rena Bryant
Rena Bryant
Records Access Officer

Attachments

2008FR00493A&P3.doc

Office of the Secretary - 125 Worth Street, CN-31, New York, NY 10013
Telephone #: (212) 788-4308; Fax #: (212) 788-4315

Re: Potential MMWR

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From: Anna Caffarelli
Sent: Thursday, March 13, 2008 3:33 PM
To:
Subject: FW: Potential MMWR on calorie information

From: Thomas R. Frieden
Sent: Thursday, March 13, 2008 3:32 PM
To: Anna Caffarelli
Subject: FW: Potential MMWR on calorie information

From: Thomas R. Frieden
Sent: Friday, January 04, 2008 11:40 AM
To: 'Shaw, Frederic (CDC/CCHIS/NCHM)'; Weatherwax, Douglas (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR on calorie information

Fred,

Thanks for your comments. Although we recognize the limitations of the analysis, we don't agree on your critique – but we can agree to disagree.

At this point we'll move on for this project, but keep MMWR in mind for future initiatives.

All the best,

Tom

From: Shaw, Frederic (CDC/CCHIS/NCHM) [mailto:fxs6@CDC.GOV]
Sent: Saturday, December 29, 2007 1:38 PM
To: Thomas R. Frieden; Weatherwax, Douglas (CDC/CCHIS/NCHM)
Cc: Shaw, Frederic (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR on calorie information

Tom,

Sorry it took me a bit to get back to you. I read the article carefully and asked a few others to also take a look, and I do not feel it bears publishing in MMWR as it stands. The conclusions being drawn by the study are, of course, problematic because of the lurking probability that people who look at caloric information are much different from everybody else, a priori. The fact that the chain under study was Subway is also a problem for interpretation because that chain is associated with lower-calorie meals and is marketed that way.

In my mind, it is not possible to conclude that looking at the caloric info is causally related to reduced calorie purchase. yes, there is an association, no doubt, but the association might just be reflecting the psychology of people who both look at caloric information and eat fewer calories. To establish causality, there would have to be other probably longitudinal study methods, like looking at consumption before and after caloric info were posted.

I am not saying that this cannot be fixed scientifically somehow in the report, but the problem is that MMWR is not a good format for presenting epi data for which the interpretation might be controversial or complex, especially

Re: Potential MMWR

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related to confounding. There just is not enough space in 1400 words to discuss the possible problems with interpretation.

One other thought: we were all intrigued by the caloric intake info itself, like the distribution of caloric intakes per meal etc. One reviewer said this alone might make a good MMWR and I tend to agree. You could just present the distribution of caloric intake and try to analyze what foods were the main high calorie culprits. This would be interesting and would probably make a nice MMWR because it would be fairly simple and would not try to make causal associations with looking at caloric info posted, and it could carry a pretty clean public health message--like x% of the total calorie intake at these places can be avoided by doing y.

One other small note. I am very impressed with what you are trying to do in NYC with obesity. I think many of us are, and I applaud you for thinking out of the box and taking some unpopular stands. We are interested in publishing more of your studies in MMWR, with the caveats above.

Happy New year to you,

Fred

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]

Sent: Tuesday, December 18, 2007 4:46 PM

To: Weatherwax, Douglas (CDC/CCHIS/NCHM)

Cc: Shaw, Frederic (CDC/CCHIS/NCHM)

Subject: RE: Potential MMWR on calorie information

Doug,

Hope you are well. Any way to get a sense of how this is going or when we might hear something?

Thanks.

Tom

From: Thomas R. Frieden

Sent: Tuesday, November 27, 2007 2:13 PM

To: Thomas R. Frieden; 'Weatherwax, Douglas (CDC/CCHIS/NCHM)'

Cc: 'Shaw, Frederic (CDC/CCHIS/NCHM)'

Subject: RE: Potential MMWR on calorie information

Doug,

Resending along with the table.

Thanks.

Tom

From: Thomas R. Frieden

Sent: Tuesday, November 27, 2007 2:12 PM

To: 'Weatherwax, Douglas (CDC/CCHIS/NCHM)'

Cc: 'Shaw, Frederic (CDC/CCHIS/NCHM)'

Subject: RE: Potential MMWR on calorie information

Doug,

Efforts to address the serious and progressive epidemic of obesity are hampered by lack of information on the impact of various interventions. Some restaurants provide information on calories, but whether customers see that information and whether seeing information affects purchases has not been well studied. We recently conducted a large cross-sectional study of customers who had just purchased food from fast-food restaurants.

In brief, the study showed that less than 5% of patrons reported seeing calorie information except at one fast-food chain (Chain A), which displayed calorie information somewhat prominently. At Chain A (Subway), 31% saw the information, and those who reported seeing calorie information purchased 49 fewer calories than those who did not; those reporting that calorie information influenced them purchased 92 fewer calories than those who saw the information but said it did not influence them.

Of course, any cross-sectional survey has limitations. Chain A patrons could be more calorie-conscious, more likely to notice calorie information, or more likely to change purchase decisions based on calorie information. We have addressed these limitations in the editorial note.

In spite of these limitations, the information in this survey suggests that providing calorie information prominently may increase the proportion of restaurant customers who see the information and the proportion who reduce calorie purchases as a result. We know of no other survey of its kind, our sample was large and based on a random sample of restaurants, and non-participation in the survey appears to have been largely random. To the extent that our findings reflect restaurant patron behavior generally, prominent posting of calorie information could substantially reduce calorie consumption, overweight and obesity.

All the best,

Tom

From: Weatherwax, Douglas (CDC/CCHIS/NCHM) [mailto:aoe8@CDC.GOV]

Sent: Wednesday, November 14, 2007 8:35 AM

To: Thomas R. Frieden

Cc: Sandra Welch; Judith Freeman

Subject: RE: Potential MMWR

Attached is a copy of MMWR Made Simple, which I pass out to new EISOs each year and which you might find helpful.

Doug

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]

Sent: Tuesday, November 13, 2007 2:10 PM

To: Weatherwax, Douglas (CDC/CCHIS/NCHM)

Cc: Sandra Welch; Judith Freeman

Subject: RE: Potential MMWR

Thanks, I'll call you then.

Re: Potential MMWR

Page 4 of 11

From: Weatherwax, Douglas (CDC/CCHIS/NCHM) [mailto:aoe8@CDC.GOV]
Sent: Tuesday, November 13, 2007 1:38 PM
To: Thomas R. Frieden
Cc: Sandra Welch; Judith Freeman
Subject: RE: Potential MMWR

404-498-2365. 8:30 will be fine.

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]
Sent: Tuesday, November 13, 2007 11:58 AM
To: Weatherwax, Douglas (CDC/CCHIS/NCHM)
Cc: Sandra Welch; Judith Freeman
Subject: RE: Potential MMWR

8:30 tomorrow? What number would be good to call you at?

From: Weatherwax, Douglas (CDC/CCHIS/NCHM) [mailto:aoe8@CDC.GOV]
Sent: Tuesday, November 13, 2007 11:50 AM
To: Thomas R. Frieden
Cc: Mary T Bassett
Subject: RE: Potential MMWR

Tomorrow morning, I'll be available from 8 to 10. Also, Thursday morning from 8 to 9.

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]
Sent: Tuesday, November 13, 2007 11:33 AM
To: Weatherwax, Douglas (CDC/CCHIS/NCHM)
Cc: Mary T Bassett
Subject: Re: Potential MMWR

Understand completely. Is there a time we could chat briefly in the next few days?

----- Original Message -----

From: Weatherwax, Douglas (CDC/CCHIS/NCHM) <aoe8@CDC.GOV>
To: Thomas R. Frieden
Cc: Mary T Bassett
Sent: Tue Nov 13 08:19:04 2007
Subject: RE: Potential MMWR

Tom,

How fast we can schedule and publish will depend upon how fast the report is cleared and whether it is accepted for publication by the Editor.

Doug

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]
Sent: Tuesday, November 13, 2007 8:10 AM
To: Weatherwax, Douglas (CDC/CCHIS/NCHM)
Cc: Mary T Bassett
Subject: RE: Potential MMWR

Ré: Potential MMWR

Page 5 of 11

Doug,

Many thanks for your guidance on this. Perhaps we can chat later this week.

A simple question, though...is there any way we might get this out by mid-January?

Thanks.

Tom

From: Shaw, Frederic (CDC/CCHIS/NCHM) [mailto:fxs6@CDC.GOV]
Sent: Monday, November 12, 2007 3:19 PM
To: Thomas R. Frieden
Cc: Weatherwax, Douglas (CDC/CCHIS/NCHM); Hewitt, Suzanne M. (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR

Tom,

MMWR would be interested in receiving this report.

Please ask the authors to contact Doug Weatherwax at MMWR (who is cc'd on this email) to get further advice on submission of the manuscript and scheduling. Please also follow the guidance for MMWR contributors on the MMWR web site for contributors: http://www.cdc.gov/mmwr/author_guide.html <http://www.cdc.gov/mmwr/author_guide.html> .

Thanks for considering MMWR for your publication.

Also, please feel free to write or call me directly anytime.

Warm regards,

Fred

Frederic E. Shaw, MD, JD

Re: Potential MMWR

Page 6 of 11

Editor, MMWR Series
MMWR Office, NCHM, CoCHIS
Centers for Disease Control and Prevention
1600 Clifton Rd. NE, MS E-90
Atlanta, GA 30333
Voice: (404) 498-6364
Fax: (404) 498-2389

From: Thomas R. Frieden [<mailto:tfrieden@health.nyc.gov>]
Sent: Tuesday, November 06, 2007 2:51 PM
To: Shaw, Frederic (CDC/CCHIS/NCHM)
Cc: Weatherwax, Douglas (CDC/CCHIS/NCHM); Hewitt, Suzanne M. (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR

Fred,

We would just report the association. One could argue that those who were health-conscious were more likely to see the information. But at the one chain that published information prominently (which is the largest meal chain in NYC), 31% of people saw it, so it's hardly a small group. We asked people whether seeing calorie information changed their choices. Those who saw but said it had not affected them bought about the same amount (13 calories less). That suggests that all types of people will see it, but the information will influence the actions of some more than others. If calorie information is prominent enough you don't have to be different to see it.

The chain at that time had provided the information in a prominent manner but not nearly as prominent as what we have mandated. This suggests to us that providing the information in all chains in an even more prominent manner would certainly get more people to see it, and that some portion of them would be likely to reduce their caloric consumption.

Thanks.

Tom

From: Shaw, Frederic (CDC/CCHIS/NCHM) [<mailto:fxs6@CDC.GOV>]
Sent: Tuesday, November 06, 2007 1:06 PM
To: Thomas R. Frieden
Cc: Weatherwax, Douglas (CDC/CCHIS/NCHM); Hewitt, Suzanne M. (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR

Tom, do you intend that the report will rest on the conclusion that seeing the calorie information caused fewer calories to be purchased? That would be very hard to substantiate, would it not, because there are lots of reasons why persons who saw

Re: Potential MMWR

Page 7 of 11

caloric information might purchase fewer calories. People who look at calorie information no doubt are fundamentally different than people who do not. Can you adjust for these factors somehow?

Fred

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]
Sent: Monday, November 05, 2007 5:53 PM
To: Shaw, Frederic (CDC/CCHIS/NCHM)
Cc: Weatherwax, Douglas (CDC/CCHIS/NCHM); Hewitt, Suzanne M. (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR

Fred,

Here are the basics, attached and pasted below. It doesn't get into either limitations or implications, but does give the basics of the study and findings. Tomorrow's officially a City holiday, so would be a quiet time for a chat if it works for you. We spoke with Jennifer Seymour and two of her colleagues at Nutrition (Acting ADS and science officer).

All the best,

Tom

Background: Fast-food consumption has been linked to increased calorie intake and obesity. We conducted a cross-sectional survey of fast-food patrons to establish calories consumed per purchase, proportion seeing calorie information, and effect of seeing calorie information on calories purchased. One of the 11 fast-food chains sampled displayed calorie information conspicuously at point-of-purchase.

Methods: From March through June 2007 we administered surveys to adult patrons exiting a random sample of fast-food chains throughout New York City. Survey questions assessed food and beverage purchases, condiments added, observation of calorie information and, if it was seen, whether patrons reported that they used calorie information. We collected receipts to calculate total calories using published values.

Results: Overall, 11,829 receipts were collected from 273 sites. Customers purchased a mean of 824 calories (range, 303–1350); >30% purchased $\geq 1,000$ calories. Only 918 (8%) patrons reported seeing calorie information. Patrons of the chain posting calorie information were significantly more likely to see nutritional information than other patrons (32% vs. 4%, $p < 0.001$). Among this chain's patrons, those seeing calorie information purchased 47 fewer calories than those not seeing the information (688 calories vs. 735 calories, $p = 0.006$). Patrons who reported both seeing and using calorie information purchased 108 fewer calories than those not seeing the information (627 calories vs. 735 calories, $p < 0.001$).

Conclusions: Calorie information was not seen by >95% of restaurant customers at 10 chains, even after food purchase. Patrons at the one chain which displayed information prominently at the point-of-purchase were much more likely to see calorie information, and those who saw calorie information purchased fewer calories.

Re: Potential MMWR

Page 8 of 11

From: Shaw, Frederic (CDC/CCHIS/NCHM) [mailto:fxs6@CDC.GOV]
Sent: Monday, November 05, 2007 6:24 AM
To: Thomas R. Frieden
Cc: Weatherwax, Douglas (CDC/CCHIS/NCHM); Hewitt, Suzanne M. (CDC/CCHIS/NCHM)
Subject: RE: Potential MMWR

Tom,

Yes we would be happy to discuss. Sounds interesting.

Could you ask your folks to put together a little 250-abstract with the methods, and the major findings laid out (something a little more expanded from the paragraph below) and get it back to me before we talk. Also, who did you speak with at Nutrition?

I am working off site this week, but available at 404 538 3967.

Thanks for thinking of MMWR.

Best regards,

Fred

Frederic E. Shaw, MD, JD
Editor, MMWR Series
MMWR Office, NCHM, CoCHIS
Centers for Disease Control and Prevention
1600 Clifton Rd. NE, MS E-90
Atlanta, GA 30333
Voice: (404) 498-6364
Fax: (404) 498-2389

From: Thomas R. Frieden [mailto:tfrieden@health.nyc.gov]
Sent: Saturday, November 03, 2007 2:05 PM
To: Shaw, Frederic (CDC/CCHIS/NCHM)
Subject: Potential MMWR

From: Cheryl de Jong-Lambert
<cdejongl@health.nyc.gov>
To: Sekai Chideya <schideya@health.nyc.gov>
CC: "Thomas R. Frieden"
<tfrieden@health.nyc.gov>, Mary T Bassett
<mbassett@health.nyc.gov>, Lynn Silver
<lsilver@health.nyc.gov>, Tamara Dumanovsky
<tdumanov@health.nyc.gov>, Christina Huang
<chuang@health.nyc.gov>, Cathy Nonas
<cnonas@health.nyc.gov>, Thomas Matte
<tmatte@health.nyc.gov>, youngcr1@verizon.net
Subject: RE: Report for submission to JAMA
Attachments:

Sent: Thu 01/10/2008 04:47 PM

Congratulations! I'm currently on the JAMA site for a resubmit. The table may need to be uploaded separately, but other than that it looks like you've got everything. I can submit it tomorrow, following up with any questions, and then cross my fingers for both of these.

Cheryl

From: Sekai Chideya
Sent: Thursday, January 10, 2008 4:35 PM
To: Cheryl de Jong-Lambert
Cc: Thomas R. Frieden; Mary T Bassett; Lynn Silver; Tamara Dumanovsky; Christina Huang; Cathy Nonas;
Thomas Matte; youngcr1@verizon.net
Subject: Report for submission to JAMA

Hi Cheryl,

The calorie labeling report that Mary Bassett's division has been writing is ready for submission to JAMA as a "Brief Report." TRF mentioned that you could assist us with this process, since he's being listed as the corresponding author.

I'm attaching the manuscript and cover letter, but I am not sure how you'd like to proceed, or what else you might need? Please let me know.

Thanks so much,

Sekai

Sekai Chideya, MD, MPH
Director of Special Projects
New York City Department of Health and Mental Hygiene
125 Worth Street, Room 349
New York, NY 10013
Office: (212) 788-5330
Cell: (917) 709-2142
Fax: (212) 964-4042
email: schideya@health.nyc.gov

Archive Mail Information

Page 2 of 2

From: Mary E Northridge
<men11@columbia.edu>
To: Mary T Bassett
<mbassett@health.nyc.gov>
CC:
Subject: Re: trying to get something published in
in the nxt 6 months
Attachments:

Sent: Tue 01/15/2008 06:00 PM

Mary B.: Our time to publication is way down, given on-line publishing ahead of print. I will shepard it through the peer review process once it is formally submitted at submit.ajph.org. Kindly list 6 suitable peer referees at submission. How does this sound? Mary N.

On Tue, 15 Jan 2008, Mary T Bassett wrote:

> Mary,
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>
>
> I am attaching a short piece on a survey of fast food chains in NYC. We
> submitted it to JAMA- but they rejected it without review.
>
>
> The content has relevance to our efforts to require posting of calorie
> information on menu boards here in NYC. The Board of Health passed a
> health code amendment about a year ago, but the NYS Restaurant
> Association successfully sued to have it overturned last summer. This
> survey shows 1) calories purchases during the lunch hour are pretty
> high, about 1/3 of purchases about 1000 cals, if you eat chicken it gets
> even higher; 2) nearly everyone who walks in the fast food chains walks
> out with no idea of the calorie content of their purchases; 3) At one
> chain - Subway- some calories info was posted before the DOHMH
> requirement, so we could look at its impact. Here 30% saw cal info and
> among those people who saw, especially those who see and use, purchase
> fewer calories.
>
>
>
> We really want it published or at least accepted, in time for what we
> expect is coming- another suit. I think AJPH is a good place- but the
> time to print is pretty long., Any thoughts on whether this might fit
> with an upcoming theme issue- I know this is the fastest way into print.
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> MTB

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> The New York City Department of Health & Mental Hygiene is now offering information important for the health of all New Yorkers. To sign up for these new and valuable updates, log-on to our website at <http://www.nyc.gov/health/email> and select the NYC DOHMH updates you'd like to receive.

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>

>

From: Mary E Northridge
<men11@columbia.edu>
To: Mary T Bassett
<mbassett@health.nyc.gov>
CC:
Subject: Re: trying to get something published in
in the next 6 months
Attachments:

Mary B.: Our time to publication is way down, given on-line publishing ahead of print. I will shepherd it through the peer review process once it is formally submitted at submit.ajph.org. Kindly list 6 suitable peer referees at submission. How does this sound? Mary N.

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>

>

From: Mary T Bassett
<mbassett@health.nyc.gov>
To: Kelly Brownell
<kelly.brownell@yale.edu>
CC: Sekai Chideya
<schideya@health.nyc.gov>
Subject: RE: would you be willing to serve as a reviewer?
Attachments:

Sent: Wed 01/16/2008 11:50 PM

Many thanks! You'll be contacted by the Journal to ask if you are willing to serve as a reviewer.

Sekai – please see suggestion of David Ludwig.

From: Kelly Brownell [mailto:kelly.brownell@yale.edu]
Sent: Wednesday, January 16, 2008 11:43 PM
To: Mary T Bassett
Subject: Re: would you be willing to serve as a reviewer?

yes. David Ludwig at Harvard would be a good reviewer as well. he has published on the topic

Kelly D. Brownell, Ph.D.
Professor of Psychology, Epidemiology and Public Health
Director, Rudd Center for Food Policy and Obesity
Yale University

Yale University – Rudd Center
309 Edwards Street – Box 208369
New Haven, CT 06520-8369
203-432-7790, 203-432-9674 (fax)
kelly.brownell@yale.edu, www.YaleRuddCenter.org

Mary T Bassett wrote:

Kelly, we are submitting an article based on a survey of patrons at NYC fast food chains to Am J Pub Health. Would you be willing to serve as a reviewer? And, as we are anxious for legal reasons (we expect another suit) to get it into print, would you be willing to turn a review around quickly? It is 1500 words.

Can you suggest another such reviewer?

I am copying Sekai Chideya who is coordinating the submission of the article

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this communication in error, please notify me immediately by replying to this message and please delete it from your computer. Thank you for your cooperation.

From: Marion Nestle [mailto:marion.nestle@nyu.edu]
Sent: Wednesday, January 16, 2008 7:30 PM
To: Mary T Bassett
Subject: RE: may I suggest you as a reviewer?

Someone at CSPI?

From: Mary T Bassett [mailto:mbassett@health.nyc.gov]
Sent: Wednesday, January 16, 2008 5:30 PM
To: Marion Nestle
Subject: RE: may I suggest you as a reviewer?

Yes, I am suggesting you and you will be contacted by AJPH- but I wanted to be sure you would be OK with it. Can you suggest anyone else? I am sending a similar email to Kelly Brownell. Anyone else?

From: Marion Nestle [mailto:marion.nestle@nyu.edu]
Sent: Wednesday, January 16, 2008 7:26 PM
To: Mary T Bassett
Subject: RE: may I suggest you as a reviewer?

Sure. Is this being sent by the journal?

From: Mary T Bassett [mailto:mbassett@health.nyc.gov]
Sent: Wednesday, January 16, 2008 5:18 PM
To: marion.nestle@nyu.edu
Subject: may I suggest you as a reviewer?

We are submitting an article based on the receipt at fast food chains survey to Am J Pub Health. You did not participate in the analysis or write up- so I think it would be OK to ask you to serve as a reviewer. Would you be willing? And, as we are anxious for legal reasons (we expect another suit) to get it into print, would you be willing to turn it around quickly? It is 1500 words.

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